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No. 05-1272

In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

PETITIONERS,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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ARGUMENT

The original source rule specifies both *what* the relator's knowledge must be ("the information on which the allegations are based") and *where* that knowledge must come from (it must be "direct" and "independent"). 31 U.S.C. § 3730(e)(4)(B). The Petition established that the circuits are divided on *what* knowledge the relator must have. The Tenth Circuit allows a relator to qualify if he knows background facts supporting his claim, Pet. App. 44a, 46a, while five other circuits require a relator to know enough facts to establish at least one element of an FCA claim. The briefs in opposition respond by arguing that the question of *where* that knowledge must come from is a factual one on which the circuits are in harmony. That proposition, even if true, is simply irrelevant.[1] As long as a relator can play games with *what* knowledge the statute requires him to possess, the words "direct" and "independent" cannot limit the *qui tam* statute, since all relators will have "direct" and "independent" knowledge of something. Review is warranted to resolve this conflict and to restore the limiting force of the original source rule.

Review is also warranted to address what Assistant Attorney General William P. Barr characterized as "the most important separation of powers question" his office had to address. 13 Op. Off. Legal Counsel 207, 207 (1989) (Barr, W.) ("Barr Op."), *superseded by* 20 Op. Off. Legal Counsel 124 (1996) (Dellinger, W.) The *qui tam* statute poses "a devastating threat to the Executive's constitutional authority" because it "allows Congress to circumvent the Executive's check and to have its laws enforced directly by its own private bounty hunters." *Id.* at 208 & 211. This question was reserved by this Court in *Vermont Agency of*

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[1] For the same reason, *Comstock Res., Inc. v. Kennard*, 125 S. Ct. 2957 (2005), is immaterial. The relator in *Comstock* actually knew about the fraud itself—he held oil leases upon which Comstock was making inadequate payments. Thus, the issue in *Comstock* was not *what* the relator knew, but rather *where* the relator got his information.

Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000), and the time has come to resolve it.

1. The "basis" of an action is not background information supporting the action, but rather "those elements of a claim that, if proven, would entitle a plaintiff to relief." *Saudi Arabia v. Nelson*, 507 U.S. 349, 356–57 (1993). Stone denies that the Tenth Circuit's standard allows a relator to get by with mere background knowledge. Stone Opp. at 16 n. 12; *but see* Pet. App. 44a, 46a (Briscoe, J. dissenting). But the "standard" he claims the court applied, Stone Opp. at 15, speaks only to the meaning of "direct" and "independent," not to the meaning of "information on which the allegations are based." In the Third, Eleventh, and Ninth Circuits, the relevant "information" is facts sufficient to establish the element of misrepresentation. In the D.C. and Eighth Circuits, the relevant "information" is facts sufficient to establish the true state of affairs. But in the Tenth Circuit, the relevant "information" is anything that supports the *qui tam* claim. Pet. App. 20–21a. Although Respondents insist this case is factbound and unworthy of review, Stone Opp. at 1, 13–14, they do not deny that the Tenth Circuit did not find that Stone knew the facts he would have needed to know to prevail in other circuits. This is not a case about disputed facts. It is a case about the application of a disputed legal standard to conceded facts.

The Tenth Circuit never found that Stone had direct and independent knowledge of the actual misstatements to the Government. Neither Respondent argues to the contrary. Instead the Tenth Circuit held, *as a matter of law*, that a "relator need not ... have in his possession knowledge of the *actual* fraudulent conduct itself." Pet. App. 21a.

Nor would the record have supported any such finding. Stone says he "knew that Rockwell was being paid under its contract based on false claims," Stone Opp. at 3, but he never claims to have seen the false claims or even to have been told about them. Instead, he says he could *infer* the false claims from (a) the fact that Rockwell was paid in part based on environmental performance, (b) the fact that

Rockwell continued to be paid despite environmental problems, and (c) a 1981 conversation in which Stone was instructed not to unilaterally discuss environmental issues with DOE—the so-called "gag order." *See* Stone Opp. at 3–4; U.S. Opp. at 10–11. Of course, any inferences Stone drew about concealment of *general* ES&H problems are irrelevant—only knowledge of *pondcrete* misrepresentations counts. *See* Pet. App. 50–51a. The mere fact that a company seeks to channel its external communications through specific, authorized employees hardly supports an inference of fraud. And the "gag order" conversation occurred years before Rockwell began making pondcrete. But in any event, Stone's inference would not have sufficed had this case been brought in the Third, Eleventh, or Ninth Circuits, and at a minimum, the Tenth Circuit did not make findings sufficient to permit Stone to win in any of those courts.[2]

a. In *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376, 388 (3d Cir. 1999) (Alito, J.), the court held that a relator must know of the actual misrepresentation itself in order to qualify as an original source. That holding irreconcilably conflicts with the Tenth Circuit's contrary ruling. Pet. App. 21a. Moreover, the relator in *Mistick* was an insider able to draw the same inference Stone claims to have drawn. *But see* U.S. Opp. at 12–13. Both relators knew that the Government was paying for certain levels of performance—competent lead paint encapsulation or compliance with ES&H standards. Both relators had reason to believe those performance levels were not being met.[3] And both relators

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[2] The fact that Rockwell argued an intra-circuit split when petitioning for en banc review (*see* Stone Opp. at 11, 18–19) is immaterial. Rockwell attempted to harmonize *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.* 190 F.3d 1156 (10th Cir. 1999) with the rule of various other circuits. But the Tenth Circuit *rejected* Rockwell's construction, and rehearing *en banc* was denied. *See* Pet. App. 15–22a. *Stone* now represents the definitive statement of Tenth Circuit law.

[3] Stone dismisses Mistick's meeting with Glidden because it occurred after Glid-Wall was improperly used for lead paint encapsulation. Stone

had some additional reason to suspect that misrepresentations might have occurred: Stone knew about the gag order, while Mistick knew that when HUD found out about Glid-Wall's defects, it ordered that work be delayed and that the "lead-abatement specifications" be changed. 186 F.3d at 381. Mistick's ability to infer false statements did not satisfy the Third Circuit's interpretation of Section 3730(e)(4)(B). Stone's far less compelling inference would not have either.[4]

b. Stone's inference also would not have satisfied the standard articulated by the Eleventh Circuit in *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 564 (11th Cir. 1994). In *Cooper*, the relator had documentary proof that his insurance company was submitting claims to Medicare for primary payment when it should have been paying them itself. *Id.* Specifically, the relator had letters from Blue Cross *referring his own claims* to Medicare. *Id.* The Eleventh Circuit only found Cooper to be an original source because his "information [was] potentially *specific, direct evidence of fraudulent activity*." *Id.* at 568 & n.12 (emphasis added). Stone's assertion that his knowledge "is even stronger than the relator's was in *Cooper*," Stone Opp. at 20, is flatly wrong. Stone not only lacked physical copies of the false statements (which Cooper had, 19 F.3d at 564),

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Opp. at 23 n.17. This is a distinction without a difference. The only timing requirement imposed by the FCA is that a relator acquire direct and independent knowledge before *the public disclosure*, not before the wrongful conduct that a defendant later conceals from the Government.

[4] The FOIA issue in *Mistick* is a red herring. Stone Opp. at 23–24, U.S. Opp. at 12–13. If the inference Mistick was able to draw had been sufficient to satisfy the original source rule, the mere act of confirming that inference through FOIA could not have changed the result. Mistick's recourse to FOIA was only relevant because the knowledge it had before filing the FOIA request—knowledge that tracks Stone's—was not sufficient. *See* 186 F.3d at 402 (Becker, C.J., dissenting) ("[E]ven if the FOIA material were to constitute a public disclosure, Mistick's qui tam action may not be 'based upon' public disclosures because it claims that it learned the true state of facts ... earlier, through meetings with the maker of Glid Wall.").

he in fact had no idea whether Rockwell ever made a false statement to the United States. Pet. App. 46–47a (Briscoe, J. dissenting). At best, he guessed that they might have—and a guess is not "specific, direct evidence."

c. Finally, Stone's inference is exactly the sort of speculation forbidden by the Ninth Circuit in *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 525–26 (9th Cir. 1998). Dr. Aflatooni interviewed specific patients and reviewed their medical records. 163 F.3d at 525. He knew of a general pattern of misbehavior—provision of medically unnecessary procedures—and he knew how defendants got paid because he was an insider at the fiscal intermediary involved in the fraud. *Id.* Similarly, Stone knew of a general pattern of misbehavior—EH&S violations—and he knew how Rockwell got paid because he worked at Rocky Flats. Dr. Aflatooni sought to *infer* false statements to Medicare, but his inference failed because he had no specific knowledge that unnecessary services were actually billed to Medicare. *Id.* at 525–26. Stone's knowledge suffers an analogous gap—just as Dr. Aflatooni did not know that any of the unnecessary work was billed to Medicare, Stone did not know that any of the pondcrete problems were concealed from DOE.[5] *See* Pet. App. 47a (Briscoe, J. dissenting) (characterizing Stone's inference as the speculation forbidden by *Aflatooni*).

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[5] Stone's blithe assertion that he would satisfy the narrow exception for triggering relators, *see* Stone Opp. at 23 n.16, is unsupported by the record. U.S. attorneys at the time denied that Stone triggered the investigation. *See* Petition at 10–11. And when it declined to intervene, the United States reviewed "substantially all" of the "material evidence and information" possessed by Stone and found *no indication* that Rockwell had made false statements. *See* Petition at 3. Stone misleads this Court by stating that the United States intervened "[b]ased in part on submissions by Mr. Stone." Stone Opp. at 2. The "submissions" to which the Government referred consisted of "voluminous documents that had been produced *during the course of document discovery*" and that "strengthened the relator's case." C.A. App. 905 (emphasis added). The issue here is whether Stone knew enough *before* discovery. At the time, the United States thought he did not.

2. Independently, the Tenth Circuit never found that Stone had direct and independent knowledge of the real ponderete problem at Rocky Flats. Instead, the Tenth Circuit held, *as a matter of law*, that it was "immaterial" that Stone's predictions about the pondcrete system were wrong. Pet. App. 22a. Respondents do not contest that pondcrete failed to solidify at Rocky Flats because a single foreman reduced the quantity of cement used, nor do they deny that Stone did not know about the foreman's actions because the change in formula occurred after Stone left Rocky Flats. *See* Petition at 7–8. Respondents never deny that the problem Stone predicted in his Engineering Report—a breakdown in the piping system—never occurred *and was never argued to the jury*. *See id.*

This suffices to establish a conflict with the Eighth and D.C. Circuits. While those courts do not require a relator to know about the misrepresentation itself, they balance that by requiring the relator to have "direct knowledge of the *true* state of the facts." *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2002) (emphasis added); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994). Stone concedes that he can only satisfy this standard for those "ES&H problems" that he actually "*observ[ed]*." Stone Opp. at 20 (emphasis added). But Stone did not observe the actual pondcrete problem, because the pondcrete formula was not changed until after he left Rocky Flats. He predicted a pondcrete problem, but even his prediction turned out to be wrong. The relators in *Nurse Anesthetists* and *Springfield* were insiders *at the time the improper conduct occurred*, which put them in a position to actually see the true state of the facts. Stone was not. *See* Petition at 7–8; Pet. App. 46a (Briscoe, J. dissenting).

3. This Court need not abstain from resolving this circuit split merely because Rockwell will still owe damages to the United States. Stone Opp. at 25–27. If Stone is not a prevailing party, his pending motion before the district court for almost $10 million in fees and costs will fail, *see*

Pet. App. 9–10a, and the Tenth Circuit's order awarding fees on appeal will be reversed. *See* Supp. Pet. App. at 1–2a. Disputes over attorneys fees regularly justify certiorari. *See, e.g., Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001). Both courts below allowed Rockwell to litigate Stone's original source status. *Cf. Craig v. Boren*, 429 U.S. 190, 193–94 (1976). Indeed, Rockwell is unaware of any court that has ever held that a *qui tam* defendant may not contest a relator's original source status.[6]

4. Rockwell never conceded that Stone qualifies as an original source. In the brief Stone cites, *see* Stone Opp. at 6–7, Rockwell was responding to a hypothetical involving a factory worker who knew that his employer was manufacturing gold-plated widgets and fobbing them off on the government as solid gold. CA App. 577. The language Stone quotes is preceded and followed by the argument that "Stone had no direct and independent knowledge that Rockwell ... concealed those problems from the government"—exactly the argument made in the Petition.[7]

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[6] The claim that Stone performed a valuable public service, Stone Opp. at 26 n.19, begs the question. If Stone is not an original source, then the Congress did not intend to compensate him.

[7] The full text of the paragraph Stone quotes reads as follows:

> *Stone's position in this case is not even remotely analogous to that of the widget factory worker. Stone lacked any knowledge whatever of fraudulent conduct by Rockwell, much less the direct and independent knowledge possessed by the factory worker and required by section 3730(e)(4)(B).* At best, Stone had first-hand knowledge (for example) that Rockwell's use of spray irrigation likely caused surface and ground water contamination; that the pondcrete Rockwell was manufacturing would eventually deteriorate and release toxins into the environment; that plutonium "gloveboxes" were leaking and lacked necessary filters; and that the beryllium machine shop was contaminated with hazardous levels of beryllium. *By his own admission, however, Stone had no direct and independent knowledge that Rockwell either concealed those problems from the government or falsely told the government that the problems did not exist.*

CA App. 578 (citations omitted) (italicized text was omitted by Stone).

And the same brief analyzed the Engineering Order, and argued that the problem it identified—"removal of sludge from the solar evaporation pond"—had nothing to do with "either pondcrete or saltcrete." CA App. at 608.

5. As to the Appointments Clause, Respondents rely on the same circular argument the Tenth Circuit employed. U.S. Opp. at 19–20, Stone Opp. at 28. The Petition does not argue that Stone is literally an "officer" of the United States. Rather, the Petition argues that the FCA gave Stone powers—namely the power to bring and to pursue a civil action "for the United States Government," 31 U.S.C. § 3730(b)(1)—that the Appointments Clause reserves for officers. *Buckley v. Valeo*, 424 U.S. 1, 140 (1976); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888).

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that the *qui tam* statute effected a partial assignment of the Government's damages claim to relators. That does not save the *qui tam* statute. *But see* U.S. Opp. at 18, 20. What *Stevens* established is that a *qui tam* relator, having received only a partial assignment, is still litigating *the Government's claim* as well as his own. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 758, 770, 772 (5th Cir. 2001) (en banc) (Smith, J. dissenting). But under the Appointments Clause, exclusive responsibility for litigating the Government's claims rests with the Executive.

The Government's effort to equate the *qui tam* statute with other laws that grant private citizens the right to sue, U.S. Opp. at 20, 21, fails because, in the *qui tam* context, the United States remains the real party in interest. *See, e.g.*, *United States ex rel. Joshi v. St. Luke's Hosp.*, 441 F.3d 552, 560 (8th Cir. 2006). And as a result, a *qui tam* lawsuit has collateral consequences that are unheard of in other private litigation contexts. For example, a judgment or settlement obtained by a *qui tam* relator can act as *res judicata* against the Government. *See In re Schimmels*, 127 F.3d 875 (9th Cir. 1997); Barr Op. at 219–20 (discussing collateral

consequences of FCA *qui tam* relator action).[8] The ability to foreclose the United States from later litigation belongs exclusively to the Executive.

6. As to the Take Care Clause, the ability to intervene (U.S. Opp. at 18–19; Stone Opp. at 28–29 n.22) is a "meager substitute for the power to decide whether prosecution will occur." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 209 n.2 (2000) (Scalia, J. dissenting). The Government flatly concedes that "[n]either the relator nor his attorney in conducting *qui tam* litigation has any duty to subordinate the relator's interest to that of the government should a conflict between those interests arise." U.S. Opp. at 19–20. And Stone proves the point by continuing to litigate, on behalf of the United States, a claim which the Chief Executive *has rejected*. Pet. App. 8-9a. The ability to intervene is simply inadequate to "ensure that the President is able to perform his constitutionally assigned duties." *Morrison v. Olson*, 487 U.S. 654, 696 (1988).

The Government's claim that the Executive retains "substantial authority to resist uses of the *qui tam* mechanism," U.S. Opp. at 22, fails because that control rests in the hands of an Article III judge, not the Article II Executive. "[A]ll disputes between [the Executive] and the relator over the conduct of the case—from discovery to witness selection to cross-examination—are decided by the Court." Barr Op. at 218. This wholesale transfer of executive power to the federal court judge overseeing the *qui tam* action violates the separation of powers and fails even the most lenient standards this Court has adopted. *See Morrison*, 487 U.S. at 696. And unless this Court enforces the Appointments and Take Care Clauses, nothing will stop the Congress from privatizing all civil law enforcement, by

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[8] Before this Court in *Stevens*, the United States acknowledged that "[t]he judgment in a *qui tam* suit has traditionally been given preclusive effect in a subsequent action brought by the government," and observed that Congress maintained that rule with the 1986 amendments. Brief for the United States at 41 n.26, *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (No. 98-1828) (filed Oct. 22, 1999).

assigning the Government's claims in connection with other statutes. *See* Barr Op. at 208.[9]

7. Finally, history does not save the *qui tam* statute. The statutes of the first Congress, cited by the Government, U.S. Opp. at 17, were passed when the Executive was in its infancy. *See* Brief of Amicus Curiae Chamber of Commerce of the United States of America, at 13–14. The most significant feature of those statutes is that none of them permitted the Government to intervene once a relator brought suit. *See* Barr Op. at 21. As Respondents and the Tenth Circuit rest on the Government's ability to intervene in *qui tam* cases, they can hardly place excessive stock in the early statutes. Moreover, only three of the seventeen so-called "informer statutes" permitted a citizen who had not suffered a personal injury to sue on behalf of the Government. In any event, "historical patterns," standing alone, "cannot justify contemporary violations of constitutional guarantees." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). Especially where the issue is Congress undermining another branch's power, the self-serving enactments of an early Congress cannot somehow empower a later Congress to brush aside the separation of powers. *See* Barr Op. at 233 (citing examples of "actions taken by the first Congress that later became viewed as unconstitutional").

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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[9] Admittedly, no court of appeals has yet held the *qui tam* statute unconstitutional. That has never stopped this Court before. *See, e.g.*, *Buckhannon*, 532 U.S. at 621 ("Indeed, our opinions sometimes contradict the *unanimous* and long-standing interpretation of lower federal courts."). And the courts below have certainly found this issue difficult—it took the en banc Fifth Circuit to reverse a panel decision striking down the *qui tam* statute. As the Barr and Dellinger opinions demonstrate, even the Assistant Attorneys' General for the Office of Legal Counsel have reached different conclusions on the issue. In any event, this case presents a important question that goes to the heart of separation of powers principles and conflicts with this Court's decisions in *Buckley*, *Edmond*, and *Morrison*. *See* Supreme Court Rule 10(c).

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 99-1351, 99-1352, & 99-1353

UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, and UNITED STATES OF AMERICA,

Plaintiff-Appellees and Cross-Appellants,

v.

ROCKWELL INTERNATIONAL CORP., and BOEING NORTH AMERICAN, INC.,

Defendants-Appellants and Cross-Appellees.

April 5, 2006

ORDER GRANTING MOTION FOR AWARD OF ATTORNEY'S FEES

Before **BRISCOE, HOLLOWAY** and **HARTZ**, Circuit Judges

In these related appeals, all merits issues have been determined. There remains pending the motion of plaintiff Stone for an award of attorneys' fees. As prevailing party in the main appeal by Rockwell, Stone is statutorily entitled to

a fee award. We have previously noted that the fee provision in 31 U.S.C. § 3730(d)(1), which provides for recovery of fees by a successful *qui tam* relator, is phrased in mandatory language. *Shaw v. AAA Eng. & Drafting, Inc.*, 213 F.3d 538, 544 (10th Cir. 2000).

We therefore grant the motion and remand to the district court for a determination of a reasonable fee award. *See Hoyt v. Robson Cos.*, 11 F.3d 983, 985 (10th Cir. 1993).

Entered for the Court

By: /s/ Elisabeth A. Shumaker
Elisabeth A. Shumaker
Clerk of Court

BRISCOE, J., dissenting:

I respectfully dissent. As I did not join the majority in its resolution of these cases on their merits, I likewise would not grant plaintiff Stone's motion for fees as a prevailing party